No. 86-442 (3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RULE 28.1 LIST

Respondent NWA, Inc. is the parent corporation of respondents Northwest Airlines, Inc. and Republic Airlines, Inc. NWA, Inc. is also the parent corporation of Northwest Aircraft, Inc., Mainline Travel, Inc. and Northwest Aerospace Training Corp. Respondent Northwest Airlines, Inc. is the parent corporation of Montana Enterprises, Inc., Affiliated Enterprises, Inc., Compass 315 Ltd., Tomisato Shoji, and Gatwick Handling Ltd. Respondent Republic Airlines, Inc. is the parent corporation of Republic Energy Corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Republic Airlines, Inc., Northwest Airlines, Inc. and NWA, Inc. respectfully request that this Court deny the petition for writ of certiorari submitted by the Air Line Employees Association, International ("ALEA"), seeking review of the Seventh Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The Operational Merger

NWA, Inc., the parent company of Northwest Airlines, Inc. ("Northwest"), acquired Republic Airlines, Inc. ("Republic") and operationally merged Republic into Northwest on August 12, 1986. The combined operation

is conducted under the Northwest name and in accordance with Northwest practices and procedures. All former Republic employees, including approximately 6,624 office, clerical, fleet and passenger service employees for whom ALEA had been the certified collective bargaining representative at Republic, became employees of Northwest on August 12.

Pursuant to its authority under the Railway Labor Act (the "Act"), the National Mediation Board ("NMB") has certified two crafts or classes at Northwest corresponding to the single ALEA-represented craft at Republic, and has certified two unions—the Brotherhood of Railway and Airline Clerks ("BRAC") and the International Association of Machinists and Aerospace Workers ("IAM")—as the collective bargaining representatives of those crafts. When the workforces were merged, Northwest followed the NMB's consistent policy of applying the bargaining structure of the "surviving" carrier to the combined workforce following an airline merger,[1] and assigned former ALEA-represented employees to the two Northwest crafts by matching former Republic job titles with the most closely corresponding job titles at Northwest.[2]

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[1] The NMB has held that where an operational merger creates a single carrier for representation purposes, the certificates of unions at the "acquired" carrier are "extinguished by operation of law". Republic Airlines, Inc. and Hughes Air Corp., 8 N.M.B. 49, 56 (1980); *see also* Southern Airways, Inc., 6 N.M.B. 817 (1979). The NMB has long held that it will certify only one union, system-wide, for each craft or class of employees at a single carrier. National Railroad Passenger Corp. (Amtrak), 12 N.M.B. 80 (1985); Chesapeake & Ohio Ry., 9 N.M.B. 362 (1982); Union Pacific Railroad, 8 N.M.B. 434 (1981); United Air Lines, Inc., 5 N.M.B. 65 (1968); KLM Royal Dutch Airlines, 3 N.M.B. 1 (1953); Pullman Co., 1 N.M.B. 503 (1946). The NMB has no authority to split a craft among various unions. *See* Switchmen's Union v. National Mediation Board, 135 F.2d 785, 792-93 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

[2] For example, in the Pan Am-National merger, the NMB ruled that the pre-merger craft or class designation in effect at Pan Am,

Following the operational merger, Northwest continued to recognize IAM and BRAC as the certified representatives of all Northwest employees, including those added to the respective crafts as a result of the merger.[3] Although the former Republic employees remain subject to the collective bargaining agreement in effect at Republic prior to the merger, BRAC and IAM now administer that agreement for former Republic employees falling within their respective crafts. In order to facilitate the melding of the workforces, beginning in July 1986, Northwest sought to negotiate Merger Transition Agreements with BRAC and IAM governing, *inter alia*, 1) the integration of the Republic employees into the Northwest workforce (including seniority integration), 2) the eventual unification of the ALEA-negotiated collective bargaining agreement with the BRAC and IAM agreements, and 3) application of the BRAC and IAM union security clauses to former Republic employees. Northwest entered into such

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the surviving carrier, should prevail. Pan American USA, Inc., 7 N.M.B. 168 (1979). As a result, the single craft or class structure at National disappeared, and the former National employees became subject to the Pan Am craft structure.

> The National employees were folded into the Pan Am system according to their predominant duties at National. Because the two airlines had different craft and classification systems, employees who had belonged to the same bargaining unit at National were split into two different bargaining units at Pan Am.

Transport Workers Union v. CAB, 725 F.2d 775, 777 (D.C. Cir.), *cert. denied*, 105 S.Ct. 87 (1984).

[3] Under NMB policy, the union which represents employees of the surviving carrier becomes the representative of all the employees in the expanded unit. The displaced union is not entitled to participate in negotiations between the carrier and the surviving union. Such a result would create "chaos not only in the attempted negotiations, but in the administrative machinery for notification, the place and time of meeting, and the like." Order of Railway Conductors v. Switchmen's Union, 269 F.2d 726, 733 (5th Cir.), *cert. denied*, 361 U.S. 899 (1959).

an agreement with BRAC on July 13, 1986, and is attempting to negotiate a similar agreement with IAM.

Proceedings In The District Court

On July 18, 1986 ALEA filed a complaint seeking to prevent Northwest from bargaining with BRAC and IAM regarding the Merger Transition Agreements, and to compel Northwest to continue to recognize ALEA as the post-merger collective bargaining representative of the Republic employees. Count I alleged that by recognizing and bargaining with BRAC and IAM regarding post-merger terms and conditions of employment affecting the Republic employees, Northwest violated its duty under Section 2, First of the Act, 45 U.S.C. § 152, First, to bargain solely with ALEA. Count II alleged that such conduct constituted interference with, influence, and coercion of the Republic employees in violation of Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth. Count III sought to compel Republic to arbitrate a grievance filed by ALEA alleging that Republic had failed to require Northwest to recognize ALEA as the post-merger representative of the Republic employees. App. 4-21.[4] As relief for counts I and II, ALEA sought, *inter alia*, a court order enjoining Northwest from recognizing and negotiating with BRAC and IAM regarding the post-merger terms and conditions of employment for Republic employees, and requiring Northwest to negotiate any such agreement with ALEA. App. 9-10, 14. As relief for count III, ALEA sought an order requiring Republic to submit the grievance to arbitration before a system board of adjustment. App. 17-18. The relief sought in the grievance was that Northwest "continue to recognize ALEA as the bargaining representative and that [North-

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[4] References to "App." are to the appendix filed by petitioner in the court of appeals, copies of which petitioner has previously filed with this Court.

west] comply with the provisions of the [ALEA] collective bargaining agreement . . . ." App. 168.

The district court, noting "the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint," held that ALEA's complaint raised a representation dispute within the exclusive jurisdiction of the NMB, and accordingly dismissed ALEA's complaint for lack of jurisdiction. App. 329. The Court of Appeals for the Seventh Circuit affirmed on the same grounds. Pet. at A-1.

Pending Proceedings Before The National Mediation Board

On August 1, 1986 ALEA filed with the NMB a petition for an election to determine whether ALEA enjoys majority support of any post-merger craft or class of Northwest employees. On October 1, 1986 the NMB completed its hearing on the issue whether the craft or class structure it previously certified at Northwest will continue in effect, or whether another structure should be created. Briefing on this issue is to be completed October 24, 1986. ALEA also petitioned the NMB for the same relief it sought before the courts below, namely, a declaration that its certificate at Republic should continue to be recognized until the election is completed. The NMB has not yet ruled on ALEA's request.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the court below that ALEA's complaint presented a representation dispute outside federal court jurisdiction does not warrant review by this Court. This Court's rulings in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), and its companion cases make clear that the NMB has exclusive jurisdiction in disputes over the designation of employee representatives, and do not permit exceptions to this statutory restriction on federal court jurisdiction even on an "interim" basis. Although ALEA characterizes its complaint as raising

statutory and contractual issues independent of its admitted representation disputes with BRAC and IAM, in fact ALEA's allegations are premised entirely on Northwest's recognition of BRAC and IAM as the post-merger representatives of former Republic employees for collective bargaining purposes. The decision below is consistent with uniform authority holding that federal courts have no jurisdiction to issue injunctive relief in disputes over representational status following an airline merger. Contrary to ALEA's suggestion that the denial of federal court jurisdiction in these circumstances allows statutory violations to go unremedied, the NMB is fully capable of addressing ALEA's representational concerns, and nothing in the decision below or in this Court's prior rulings prevents a federal court from exercising jurisdiction where the statutory or contractual issues are not dependent on representation issues for their resolution.

ALEA's disagreement with the NMB's policy that the certifications of unions on the "acquired" carrier in a merger are extinguished by operation of law does not provide a basis for the issuance of a *status quo* injunction in this case. If ALEA wishes to challenge the NMB's merger policy, it must do so directly by petitioning the NMB for certification. The current proceedings before the NMB provide the only proper means of protecting whatever representational rights ALEA may have. ALEA's reliance on NMB cases to support its substantive claims, although flawed, serves to confirm that ALEA's statutory and contractual allegations necessarily and directly raised representation issues within the NMB's exclusive jurisdiction.

I. The Seventh Circuit's Determination That The District Court Did Not Have Jurisdiction To Require Northwest To Recognize And Bargain With ALEA Following The Republic-Northwest Merger Neither Raises An Important Issue Requiring This Court's Attention Nor Conflicts With Decisions Of This Court Or Other Courts Of Appeals

A. The Ruling That ALEA's Complaint Raised A Representation Dispute Within The Exclusive Jurisdiction Of The National Mediation Board Does Not Merit Review By This Court

The NMB's exclusive jurisdiction to hear and resolve disputes between unions over who will represent employees of a carrier subject to the Railway Labor Act is well established. In *Switchmen's Union v. National Mediation Board, supra*, and two companion cases[5] decided in 1943, this Court definitively ruled that the Act commits the adjudication of representation disputes to the NMB. Thus, a controversy between unions as to which should be the proper representative of a craft of employees does not constitute a proceeding "arising under any law regulating commerce" over which the federal courts have jurisdiction. *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337 (1943).

> However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive.

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[5] General Committee of Adjustment v. Southern Pacific Co., 320 U.S. 338 (1943); General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., 320 U.S. 323 (1943). *Accord*, Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965).

General Committee v. Missouri-Kansas-Texas R. Co., *supra*, 320 U.S. at 336 (footnotes omitted).[6] Thus, to the extent the decision of the court below was based on its determination that federal courts lack jurisdiction to hear representation disputes, it was undoubtedly correct.

Acknowledging that a dispute within the NMB's jurisdiction does in fact exist over who will represent the employees in the post-merger crafts (Pet. at 7), ALEA nevertheless contends that the "factual context" of the dispute also gives rise to statutory and contractual claims over which the federal courts do have jurisdiction, and that pursuant to that jurisdiction the courts below should have issued an injunction requiring Northwest to recognize and bargain with ALEA pending completion of the NMB proceedings. According to ALEA, such interim relief is necessary to preserve the NMB's jurisdiction over the representation dispute, and the absence of federal jurisdiction to issue an injunction in these circumstances will allow violations of the Act to go unremedied.

The Seventh Circuit's decision is not as broad as ALEA's characterization of it would suggest, nor does the absence of federal court jurisdiction to require a carrier to recognize and deal with a particular union following a merger carry with it the dire consequences that ALEA describes. Indeed, it is the exercise of federal jurisdiction in matters relating to representation disputes, and not the absence of such jurisdiction, that carries the potential to interfere with the NMB's statutory role and impair the employee protections created by Congress in

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[6] Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, provides that "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . . it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties . . . the individuals or organizations that have been designated . . . to represent the employees involved in the dispute, and certify the same to the carrier . . . ."

the Act. Any challenge to Northwest's recognition of BRAC and IAM—and any request for interim relief pending completion of the NMB proceedings—must be made first to the NMB, in which Congress has vested complete authority to resolve controversies of this nature.

1. *The Court Below Correctly Determined That ALEA's Complaint Raised A Representation Dispute*

Whether or not the absence of federal court jurisdiction to address representation disputes might ever leave employees or their representative without a remedy for related violations of the Act, that is not the case herein. ALEA's complaint raised issues that fall directly within the scope of representation disputes that could have been —and now are—before the NMB for resolution. This is simply not a case in which the absence of federal jurisdiction in any respect impairs the ability of a union to protect its representational status.

As ALEA candidly explains in its petition, "[t]he principal focus of the complaint is the allegation that by agreeing to extend recognition to BRAC [and, presumably, IAM] as the exclusive representative[s] of the post-merger employee group . . . Northwest violated Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth." (Pet. at 6.) The relief sought in the complaint, and in the grievance that ALEA sought to compel Republic to arbitrate, was an order enjoining Northwest from recognizing and negotiating with BRAC and IAM regarding the post-merger terms and conditions of employment for Republic employees and requiring Northwest to negotiate any such agreement with ALEA. The court below was clearly correct in finding that ALEA's allegations, although framed in statutory and contractual terms, constituted a thinly disguised representation dispute. As of the effective date of the merger, all Republic employees became Northwest employees, and BRAC and

IAM were unquestionably the certified collective bargaining representatives of the Northwest crafts into which the Republic employees formerly represented by ALEA fell.[7] Section 2, Ninth of the Act requires that a carrier "treat with the representative so certified" by the NMB. The gist of ALEA's complaint was that Northwest nevertheless should recognize ALEA as the collective bargaining representative of the former Republic employees, and should be enjoined from bargaining with IAM and BRAC regarding the terms of their post-merger employment. This is precisely the kind of determination that the NMB —and the NMB alone—is empowered to make.

This case does not raise statutory or contractual issues independent of the representation dispute. It is the fact of recognition itself, and not some independent conduct on the part of Northwest, which is alleged to violate the Act and the ALEA agreement. The merit of ALEA's substantive allegations is dependent on a determination of which union is the post-merger representative of the former Republic employees. To require Northwest to recognize and bargain with ALEA in these circumstances necessarily decides the very question before the NMB. The same is true of ALEA's request for interim relief. For the period it is in effect, an injunction prescribing which union Northwest must deal with regarding its employees necessarily decides a representation dispute and invades the province Congress set aside for the NMB. This case presents nothing more than an attempt, by artful pleading, to obtain from a court what the Act mandates must be provided by the NMB.[8]

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[7] The NMB certifications of BRAC and IAM as employee representatives were not affected by the substantial increase in the size of the craft as a result of the merger. *See* IAM v. Alitalia Airlines, 600 F. Supp. 268 (S.D.N.Y. 1984), *aff'd per curiam*, 753 F.2d 3 (2d Cir. 1985) (certification still valid despite fact that unit began with only 11 employees and expanded to over 450 employees).

[8] As the Court of Appeals for the Sixth Circuit stated in rejecting just such an attempt:

2. *Courts Have Consistently Recognized That Injunctions To Preserve The Representational Status Of A Union Following A Merger Would Impermissibly Interfere With The NMB's Jurisdiction*

Contrary to the assertions in ALEA's petition, courts have not had any difficulty squaring the principle of exclusive NMB jurisdiction in representation cases with their own obligation to enforce carrier obligations under the Act. With its decision in this case, the Seventh Circuit joins four other courts of appeals in holding that federal courts do not have jurisdiction to require a carrier to recognize one union over another following a merger.[9] The courts have uniformly recognized that the issuance of an injunction requiring a carrier to recognize

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> By skillful pleading in this case, appellant has tried to avoid the consequences of [the *Switchmen's Union* trilogy], which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's contract obligations. . . . Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute.

Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

[9] International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983); International Ass'n of Machinists v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964); Division No. 14, Order of Railroad Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962). *See also* Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc., 656 F.2d 16 (2d Cir. 1981); Air Line Employees Ass'n v. CAB, 413 F.2d 1092 (D.C. Cir. 1969); Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

and negotiate with one of several competing unions following a merger would not be an act of neutrality unrelated to the NMB's functions. Such an injunction would constitute an active, interim disposition of the representation question. In this case, the relief requested by ALEA would divide the Northwest crafts and preserve the representative status of a union whose certification was "extinguished by operation of law" [10] upon the merger of Republic into Northwest. A judicially-imposed requirement that Northwest bargain with ALEA would, for the period it is in effect, determine the identity of the employee representative, and would do so in a manner contrary to NMB precedent and to the rights of BRAC and IAM.[11] Such a result clearly usurps the NMB's authority and crosses the line drawn by this Court in *Switchmen's Union* and its companion cases.

The cases cited by ALEA to establish a conflict among the circuits regarding jurisdiction to issue an injunction notwithstanding a related representation dispute simply do not involve the kind of direct interference with the NMB's function that is present here. More importantly, not a single case cited by ALEA grants relief similar to that requested herein, *i.e.*, an order requiring a carrier to recognize and bargain with a particular union whose representative status is disputed. Indeed, the cases cited by ALEA demonstrate that the courts have not found it difficult at all to distinguish between issues that infringe upon the NMB's exclusive jurisdiction and those that do not, and have not hesitated to exercise their jurisdiction over the latter.

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[10] Republic Airlines, Inc. and Hughes Air Corp., *supra*, 8 N.M.B. at 56.

[11] *See* Division No. 14, Order of Railroad Telegraphers v. Leighty, 298 F.2d 17, 21 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) (in post-merger representation dispute "an injunction . . . would not merely hold the line, without injury to either party . . . Rather, it would . . . give to Division 14 the rights it claims to the exclusion of Division 13.").

Thus, in *Summit Airlines, Inc. v. International Brotherhood of Teamsters*, 628 F.2d 787 (2d Cir. 1980), which ALEA cites to show that some courts have granted injunctions notwithstanding the presence of representation issues, the court merely upheld the issuance of an injunction against a union's efforts to bypass the NMB and force recognition through picketing and economic coercion. The Second Circuit noted that the carrier did not have a right to invoke NMB election and certification procedures,[12] so that the only way to enforce the mandate of Section 2, Ninth was to enjoin further economic coercion by the union. Similarly, in *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), the court issued a declaratory judgment and an injunction against a strike by a union to force the carrier to recognize and bargain with it despite a pending NMB election to determine which of two unions was the true representative. The injunctions in *Summit* and *Pan American* did not require the carrier to recognize or negotiate with any one union, and their issuance did not decide a representation dispute or otherwise infringe on the NMB's authority. These cases in no respect support ALEA's claim of federal jurisdiction to issue an injunction in this case.

In *Adams v. Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977), the court held that jurisdiction existed to hear union claims that the carrier, through "threats, harassment, surveillance activities and selective discharges during the course of the organizational drive" had violated Section 2,

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[12] Summit Airlines, Inc. v. International Bhd. of Teamsters, *supra*, 628 F.2d at 793, *citing* Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 666 (1965).

Third and Fourth. ALEA has made no such allegations here, instead claiming only that the very act of recognizing BRAC and IAM constitutes improper influence and coercion. In *Air Line Pilots Association v. Texas International Airlines, Inc.*, 567 F. Supp. 66 (S.D. Tex. 1983), *appeal docketed*, No. 83-2272 (5th Cir. July 18, 1983), the court required the carrier to arbitrate a grievance complaining of the carrier's refusal to apply the existing collective bargaining agreement to a subsidiary carrier, at which the union was seeking representational status. In finding that requiring the carrier to arbitrate the grievance would not interfere with the NMB proceeding, the court contrasted the relief it was granting from that sought in *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), in which the union "had sought an order by the district court compelling the carrier to bargain with it . . . in the face of an ongoing representation dispute pending before the NMB . . . ." 567 F. Supp. at 77. In the present case, ALEA seeks both from the court and from court-ordered arbitration relief similar to that sought in *Ruby*, for which the *Texas International* court implied court jurisdiction would not exist. The allegations of employee coercion and interference in the remaining cases cited by ALEA [13] are based on the termination or layoff of employees during union organizing campaigns. The NMB has no authority to remedy such discharges, and the issu-

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[13] Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970); Air Line Pilots Ass'n v. Scheduled Skyways, Inc., 567 F. Supp. 171 (W.D. Ark. 1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984); International Ass'n of Machinists v. Altair Airlines, Inc., 481 F. Supp. 1359 (E.D. Pa. 1979); Union of Professional Airmen v. Alaska Aeronautical Industries, Inc., 95 L.R.R.M. (BNA) 2868 (D. Alaska 1977); Kent v. Fugere, 438 F. Supp. 560 (D. Conn. 1977); Associated Pilots of Alaska International Air, Inc. v. Alaska International Air Inc., 96 L.R.R.M. (BNA) 3233 (D. Alaska 1976).

ance of an injunction in such circumstances therefore does not interfere with the NMB's functions.[14]

Contrary to ALEA's characterization of decisions rejecting federal jurisdiction in representation cases as espousing a "mechanistic approach" to jurisdiction, courts have very carefully and correctly applied this Court's teachings in *Switchmen's Union*, and have found federal jurisdiction lacking only where its exercise would truly interfere with the NMB's statutorily mandated duties.[15] The record in the present case demonstrates that the jurisdictional issue was extensively briefed in the district court,[16] and that the ruling of the court below correctly applied the controlling legal principles. There is, in short, no conflict or confusion among the lower courts as to the limits on federal jurisdiction in representation disputes, and the decision of the court below in this case is entirely consistent with the principles on which those limits are based.

3. *NMB Procedures Provide The Means By Which A Union May Seek To Preserve Its Representative Status*

As becomes clear upon analysis of ALEA's complaint in light of controlling NMB authority, ALEA's real dispute is with the NMB's substantive policy that the certifi-

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[14] *See* Associated Pilots of Alaska International Air, Inc. v. Alaska International Air, Inc., *supra*, 96 L.R.R.M. at 3237 (Section 2, Ninth "provides an effective remedy for the resolution of representational disputes, including the company union situation and to compel a reluctant employer to bargain . . . . However, [Section 2, Ninth] provides no remedy for other violations, such as the unlawful discharges . . . herein alleged . . . .").

[15] *See, e.g.*, International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983); Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

[16] *See* Memorandum In Support Of Defendant Northwest's Motion To Dismiss, Or In The Alternative, For Summary Judgment.

cate of the union at the "acquired" carrier in an airline merger is extinguished as a matter of law. By its suit here, ALEA seeks to obtain indirectly what it apparently has concluded it cannot obtain from the NMB itself. This is improper. *See Order of Railway Conductors v. Pennsylvania Railroad Co.*, 323 U.S. 166 (1944) (no review having been sought of NMB decision, court powerless to grant remedy directly or indirectly setting decision aside).

Moreover, ALEA is not without recourse before the NMB. ALEA can pursue at least three remedies in that forum. First, ALEA can ask the NMB to adopt a policy whereby the certificate of the union at an "acquired" carrier continues to be effective until an election is held to determine the post-merger employee representative. If the NMB were to issue such a change in policy, as ALEA has asked it to do, then ALEA's certificate would remain in effect and could be enforced in federal court. Another Republic union, the Association of Flight Attendants, also filed such a request. *See Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986).[17] Second, ALEA can ask the NMB to investigate whether Republic or Northwest is the "surviving" carrier.[18] If ALEA were able to convince the NMB that Republic rather than Northwest was the "surviving" carrier following the merger, ALEA's certificate would continue in effect, the certificates of BRAC and IAM would be extinguished, and ALEA would become the post-merger employee representative.

Third, ALEA can petition the NMB for an election. Section 2, Ninth of the RLA requires the NMB to act

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[17] The NMB determined that Northwest was the "surviving" carrier, and concluded that "[a]ll certifications issued on Republic Airlines were extinguished on August 12, 1986." Northwest Air Lines, Inc., 13 N.M.B. 399, 403 (1986).

[18] The "acquiring" carrier is not always the "surviving" carrier for representation purposes. For example, following the acquisition of Continental Airlines, Inc. by Texas International Airlines, Inc., Continental was the surviving carrier.

upon that petition within 30 days, although NMB action in an election often takes longer.[19] The NMB has repeatedly emphasized that this is the ousted union's proper recourse after it loses its representative status in a merger.[20] The NMB is now in the midst of just such a proceeding.[21]

B. The Decision Below Is Not Inconsistent With Decisions Of This Court Upholding Federal Jurisdiction To Enforce The Railway Labor Act

ALEA's contention that the decision of the court below is inconsistent with court decisions upholding federal jurisdiction to enforce Section 2, Third and Fourth of the Act is unpersuasive, and ignores the teachings of *Switch-*

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[19] Pending a decision by the NMB, the employees will be represented by BRAC or IAM, which have a duty to represent them fairly. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944). Under the Act, when one union succeeds another as a collective bargaining representative, the new union administers the labor contract executed by its predecessor. Order of Ry. Conductors v. Switchmen's Union, *supra*; Air Transport Employees v. Western Airlines, Inc., 105 L.R.R.M. (BNA) 3004, 3007 (C.D. Cal. 1980); Airlift International, 4 N.M.B. 142 (1967).

[20] Republic Airlines, Inc. and Hughes Air Corp., 8 N.M.B. 13, 18 (1980); Pan American USA, Inc., 7 N.M.B. 168 (1979). The NMB has evolved special procedures which make it easier for an ousted union to obtain an election after a merger than in other circumstances, and sometimes has required no showing of interest whatsoever. *See* Republic Airlines, 7 N.M.B. 21 (1979); Continental Airlines, 10 N.M.B. 24 (1982); Air West, 5 N.M.B. 85 (1968).

[21] ALEA's argument that the NMB's policy permits carriers to arrange the corporate form of their merger transaction so that one carrier or the other is the surviving entity, and thus predetermine whether one union or another will be recognized following the merger, is without merit. The NMB "has shown itself alert to prevent carriers from frustrating representation rights by artful corporate devices." Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc., 502 F. Supp. 423, 425 (E.D.N.Y. 1980), *aff'd*, 656 F.2d 16 (2d Cir. 1981). *See, e.g.*, Pan American USA, Inc., 7 N.M.B. 168 (1979).

men's Union that the withholding of federal jurisdiction in representation matters is a result of congressional restriction, not judicial discretion. To be sure, in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), and *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971), this Court ruled that federal courts did in fact have subject matter jurisdiction over claims of unlawful carrier influence and coercion. The *Texas & New Orleans Railroad* decision, however, was decided before Congress added Section 2, Ninth to the Act, thereby establishing the NMB as the exclusive forum for representation disputes. In *Switchmen's Union*, this Court distinguished the circumstances presented by *Texas & New Orleans Railroad* and *Virginian Railway* from the very different circumstances presented by a representation dispute arising after the enactment of Section 2, Ninth:

> In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it . . . .

320 U.S. at 300-301. Thus, *Switchmen's Union* made clear that *Texas & New Orleans Railroad* and *Virginian Railway* cannot be read to establish federal court jurisdiction to determine issues relating to the employees'

choice of bargaining representative, which Congress gave the NMB the exclusive power to resolve.[22] Courts that have confronted arguments such as those made by ALEA here have had no difficulty in squaring the two lines of cases. *See, e.g., Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976); *see also Texidor v. Ceresa*, 590 F.2d 357 (1st Cir. 1978).

According to ALEA, under the "better-reasoned" lower court decisions as well as *Texas & New Orleans Railroad*, *Virginian Railway*, and *Chicago & Northwestern Railway*, "the proper inquiry is whether the relief sought will interfere with or usurp functions exclusively committed to the NMB." Pet. at 15. Even if ALEA were correct that the court below and other courts reaching similar results utilized a different standard, under *Switchmen's Union* the only proper answer to that inquiry in this case would have to be in the affirmative. An order requiring Northwest to recognize and negotiate with ALEA would not serve to ensure Northwest's "neutrality" during the NMB proceedings, but rather would decide who would represent the former Republic employees during the period it was in effect. Whatever arguments ALEA might make in support of allowing each union in a merger situation to continue to represent its members until the NMB decides who the representative at the combined operation will be, it is up to the NMB to decide whether or not to accept those arguments and adopt the policy ALEA advocates. To date, however, the NMB has not done so, and federal courts may not impose such a policy,

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[22] In *Chicago & Northwestern Railway*, this Court upheld federal jurisdiction to enforce Section 2, First of the Act, which requires a carrier to make every reasonable effort to make and maintain collective bargaining agreements. In so ruling, this Court noted that the NMB's jurisdiction did not extend to such disputes. 402 U.S. at 580-81.

even as a nominally "interim" measure.[23] *Switchmen's Union* makes clear that the NMB's jurisdiction over representation matters is complete, and the courts may not invade that jurisdiction even for the ostensible purpose of assisting the NMB in preserving its jurisdiction. The NMB—and the NMB alone—has the authority under the Act to determine what policies and procedures in representation matters are necessary to effectuate the statutory guarantees which it is charged to protect.

II. Northwest's Recognition Of BRAC And IAM As The Post-Merger Representatives Of The Former Republic Employees Did Not Violate The Railway Labor Act

Correctly noting that the court below did not reach the merits of its substantive allegations, ALEA nevertheless suggests that the Seventh Circuit's "approach" is contrary to the Act and controlling precedent. ALEA's suggestion is without merit. The mere fact that a carrier recognizes and bargains with one union during a representation dispute does not alone constitute unlawful interference or coercion under the Act.[24] *See Texidor v.*

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[23] ALEA's claim that failure to maintain the *status quo* will enable the carrier to make a unilateral choice as to the representative of its employees is erroneous. Under NMB policy, the choice is dictated by the circumstances of the merger. In any event, this case does not present the sort of blatant company unionism that was at issue in *Texas & New Orleans Railroad* and was held there to justify judicial intervention.

[24] Under the structure of the Act, there is no way for a carrier to raise a representation dispute before the NMB; only employees, or those seeking to represent employees, may do so. Nor is the carrier a formal party to representation disputes before the NMB. *See, e.g.*, Air Florida, Inc., 8 N.M.B. 546 (1981) (carrier lacks standing to challenge Board's waiver of election bar rule); Western Airlines, Inc., 7 N.M.B. 337, 338 n.1 (1980) (carrier's request for hearing on proper class or craft denied). Thus, in a merger context, the surviving carrier has no alternative but to honor the outstanding certificates of its own unions—in this case, BRAC and IAM. The displaced union then may invoke the NMB's services to investigate the representation dispute.

Ceresa, *supra*, 590 F.2d at 539 ("Negotiating and signing a collective bargaining agreement are not, in and of themselves, the kind of coercion envisioned by Section 2 Third"). Such actions have also been held insufficient to create a violation of the Act beyond the power of the NMB to address. *See Ruby v. American Airlines, Inc.*, *supra*, 323 F.2d at 254 (allegation that carrier unlawfully bargained with in-house union insufficient to take case out of representation dispute); *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, *supra*, 406 F. Supp. at 508-09 (allegation that carrier negotiations with rival union improperly coerced employees fell within NMB jurisdiction).

ALEA also challenges respondents' position that under applicable NMB precedent, its certification was extinguished by operation of law upon the merger of Republic into Northwest. ALEA's argument that Northwest has misread the NMB's merger decisions is not only incorrect; it also demonstrates the dependence of ALEA's substantive allegations on the representation issues now before the NMB. ALEA contends that the NMB decisions, rather than establishing that the certifications of unions on an "acquired" carrier are extinguished by operation of law, instead stand for the proposition that following a merger a carrier may voluntarily recognize a union which has a "clear majority" of the post-merger employee group. Because in the present case the identity of the majority union has not yet been determined by the NMB, ALEA argues that Northwest's voluntary recognition of BRAC and IAM was improper. Pet. at 22-24.

ALEA's argument fails on several counts. First, Northwest's understanding of NMB policy is not mere speculation. In accordance with its policy of certifying only a single representative for a system-wide craft or class at a carrier, the NMB looks at more than just the number of employees represented by the competing unions in deciding which will become the representative at the

combined operation. In *Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986), the NMB stated that "the most relevant factor" in determining whether a merger results in a single carrier is "the degree of integration of operations." 13 N.M.B. at 401. For example, in the Republic-Hughes Air merger, in order to determine the status of competing unions, the NMB examined, *inter alia*, the acquiring carrier's motive for the acquisition, including the existence of any anti-union animus; how the combined operation was going to be held out to the public; whether there would be combined management and flight operations; and whether there would be combined labor relations and payroll policies. *Republic Airlines, Inc. and Hughes Air Corp., supra*, 8 N.M.B. at 54-55. Indeed, the NMB's decision in *Republic* does not even mention which of the competing unions claimed a majority of the post-merger employees. Nevertheless, the NMB ruled that the certification of the union at the acquired carrier was "extinguished by operation of law." 8 N.M.B. at 56.

Second, even if ALEA were correct, Northwest had a reasonable basis for believing that its own craft designations would remain in place after the merger and that BRAC and IAM would continue to represent a majority of the employees in those crafts.[25] In these circumstances,

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[25] ALEA's claim that it will be the majority union in the combined employee group following the merger (Pet. at 3 n.3) is based on an assumption that the single Republic craft structure would survive the merger, rather than the two craft structure certified by the NMB at Northwest. Should the Northwest structure survive—which, given the NMB's consistent policy of recognizing the unions at the surviving carrier in an airline merger, is more likely to be the case—it does not appear that ALEA will have a majority in either Northwest craft. Although ALEA asserts in its Petition (Pet. at 4 n.3) that Northwest neither argued nor offered evidence in the district court that it believed BRAC and IAM would have a majority in the post-merger crafts, Northwest did in fact submit such evidence. *See* App. 404, 407. This evidence was submitted in response to arguments by ALEA in opposition to Northwest's motion to dismiss and was before the district court on ALEA's motion for reconsidera-

the mere fact that ALEA had challenged the representative status of BRAC and IAM before the NMB did not preclude further dealings with those unions as the certified representatives of Northwest's workforce.[26]

Most importantly, however, whether ALEA or Northwest is correct in its understanding of NMB policy, the pivotal nature of such policy to ALEA's allegations of statutory and contractual violations demonstrates beyond any doubt that this action is fundamentally representational in nature. A court simply cannot decide the merits of ALEA's complaint, or grant the injunctive relief ALEA has requested, without infringing on issues committed by Congress to the NMB's exclusive jurisdiction. In these circumstances, the decision of the court below is in full accord with longstanding precedent in this and other courts, and does not merit review.

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tion of the court's order dismissing this case. In any event, respondents agree with ALEA that the determination of majority status is the function of the NMB, and need not be resolved herein.

[26] ALEA cites Pan American World Airways, Inc. v. International Bhd. of Teamsters, *supra*, for the proposition that a carrier may not negotiate even with a certified union during the pendency of a representation dispute. Pet. at 21. In *Pan Am*, however, the court held only that a carrier could not be *required* to negotiate in such circumstances. Nothing in *Pan Am* or in any other case cited by ALEA stands for the proposition that a carrier is prohibited from negotiating with the certified representative of its employees in circumstances similar to those herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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